STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1788

State of Minnesota,
Respondent,

vs.

Lonny Duane Lundgren,
Appellant.

Filed September 17, 2018
Affirmed
Florey, Judge

Le Sueur County District Court
File No. 40-CR-15-75

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brent Christian, Le Sueur County Attorney, Benjamin J. King, Assistant County Attorney, Le Center, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Stauber, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant challenges his 2017 felony driving-while-impaired (DWI) conviction. In 2003, he was convicted of criminal-vehicular operation (CVO). Three statutory subsections were listed as bases for the CVO conviction, and only one qualifies to enhance appellant's 2017 DWI offense to felony level. Appellant argues that the jury in his DWI trial should have been instructed to determine if the CVO conviction is under an enhancement subsection. He also argues that the district court improperly limited his arguments on that issue. We affirm.

FACTS

In 2015, following a traffic stop, appellant Lonny Duane Lundgren was charged with felony DWI and driving after cancellation. The DWI offense was charged under Minn. Stat. § 169A.24, subd. 1(3)(ii) (2014), which imposes felony liability if the driver was previously convicted of substance-related criminal vehicular homicide or injury. *See* Minn. Stat. § 609.21 (2006). The complaint alleged that appellant had a qualifying 2003 conviction.

Appellant moved to dismiss the DWI charge. He asserted that his 2003 conviction did not qualify to enhance his DWI charge to felony level. At an omnibus hearing, the state offered a copy of the 2003 sentencing order indicating that appellant was convicted of CVO—substantial bodily harm "in violation of M.S. 609.21, Subd. 2a(1), (2)(i), (7)." The district court denied appellant's motion and concluded that appellant was convicted of

violating three subsections of section 609.21, and subdivision 2a(2)(i) qualifies to enhance the DWI charge.

In January 2016, appellant moved the district court to accept a plea over the state's objection to driving after cancellation and to dismiss the DWI charge. Appellant again asserted that his 2003 conviction did not support the felony DWI charge. He argued that he could not have been lawfully convicted under three subsections for a single crime and that the jury should "determine of what [appellant] was previously convicted." He submitted a copy of the CVO complaint. It indicates that he was charged with numerous counts, including one count of CVO—substantial bodily harm, with three separate subsections listed under that single count. Appellant also submitted plea-hearing and sentencing transcripts.

At the plea hearing, appellant's attorney indicated that appellant would be pleading guilty to CVO under three subsections. In addition, the following exchange occurred:

> Q: [Y]ou've pled guilty to, uhm, [CVO], and would you agree that this occurred on September 15, 2002, in the City of St. Peter, Nicollet County, Minnesota, or the day before?
> A: Yes.
> Q: Okay. Now, at—at or about that time in the City of St. Peter were you driving a motor vehicle?
> A: I believe so, yes.
> Q: Whose vehicle were you driving?
> A: My own.
> Q: And that was a 1989 GMC Suburban?
> A: Yes.
> Q: And, uhm, what happened?
> A: Uh, there was a fight after the bar had closed in St. Peter and, uh, I was involved in that fight and, uhm, there was ten or fifteen guys, uhm, against me and two of my friends. Uhm, I had hit my head on the utility box outside of the bar and I was kicked in the head several times and got knocked out

> eventually. I don't remember anything after that until the next morning.
> Q: Okay. Uhm the—the record reflects that you drove this vehicle and hit a, uhm, person named, uh, [J.B.]. If that's what the record shows and witnesses would testify to that, would you have any reason to disagree with that?
> A: No.
> Q: And you would agree that, uh, [J.B.], if the report shows this and the witnesses so would say, that [J.B.] suffered substantial bodily harm?
> A: Yes.
> Q: Had you been drinking at that time?
> A: Yes.
> Q: And, uh, do you believe that the alcohol which you had consumed affected your ability to drive the motor vehicle?
> A: Yes.

Appellant admitted that he was intoxicated at the time of the CVO.

The district court denied appellant's motion to enter a plea over the state's objection. The court noted that appellant should have been charged with separate counts, but "there can be no doubt that [appellant] admitted, under oath, that he was under the influence of alcohol when he caused substantial bodily harm to another as a result of operating a motor vehicle." The court concluded that appellant's prior conviction qualified to enhance the DWI charge.

A jury trial commenced in February 2016. The district court instructed appellant that he was to refrain from arguing that his 2003 conviction is not under an applicable enhancement subsection. At trial, the sole admitted document relating to appellant's 2003 conviction was a copy of the 2003 sentencing order. Appellant also testified about the prior offense. He acknowledged that he admitted to three crimes, as set forth in the 2003 sentencing order, and was convicted of felony-level CVO—substantial bodily harm.

Appellant requested that the jury be instructed on the three subsections listed in the 2003 sentencing order. The district court denied appellant's proposed instruction because a determination was made that the 2003 conviction qualified for purposes of enhancement. The jury was instructed that, in order to convict appellant, it needed to find that appellant "had a previous felony conviction for [CVO]—substantial bodily harm." The jury found appellant guilty of first-degree DWI. He was sentenced to a stayed 66 months' imprisonment. This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by instructing the jury that it must find that appellant has a previous felony conviction for CVO—substantial bodily harm.

Appellant first argues that the district court committed reversible error by merely requiring the jury to find that he has a previous felony conviction for CVO—substantial bodily harm. He asserts that the jury should have been tasked with determining if he was previously convicted under a specific statutory subsection.

In determining the adequacy of jury instructions, we apply an abuse-of-discretion standard. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). Likewise, "[t]he refusal to give a requested jury instruction lies within the discretion of the district court and no error results if no abuse of discretion is shown." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). District courts must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[ ] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011).

The Constitution provides a criminal defendant the right to a jury determination "that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2313 (1995). "[A] prior conviction is an element of the offense of aggravated DWI." *State v. Berkelman*, 355 N.W.2d 394, 395 (Minn. 1984). Appellant's DWI offense was charged as a felony under Minn. Stat. § 169A.24, subd. 1(3)(ii), which imposes felony liability for a DWI offense when the driver has previously been convicted of a felony under "Minnesota Statutes 2006, section 609.21," subdivision 2a, clauses (2) to (6). Under subdivision 2a of section 609.21 (2006):

> A person is guilty of [CVO] resulting in substantial bodily harm . . . if the person causes substantial bodily harm to another, as a result of operating a motor vehicle;
>
> (1) in a grossly negligent manner;
>
> (2) in a negligent manner while under the influence of:
>
> (i) alcohol;
>
> . . . .
>
> (7) where the driver who causes the accident leaves the scene of the accident . . . .

Appellant's sentencing order indicates that he was convicted of violating 2a(1), concerning gross negligence; 2a(2)(i), concerning alcohol; and 2a(7), concerning leaving the scene of the accident. Of the three, only a conviction under 2a(2)(i), concerning alcohol, qualifies to enhance appellant's DWI offense to a felony under Minn. Stat. § 169A.24, subd. 1(3)(ii).

Appellant asserts that the district court abused its discretion by not instructing the jury to find whether his CVO conviction is under subdivision 2a(2)(i). District courts have broad discretion in formulating jury instructions. *State v. Thao*, 875 N.W.2d 834, 841

(Minn. 2016). Here, there was only one prior conviction at issue, the 2003 CVO resulting in substantial bodily harm. The district court, in pretrial proceedings, determined that the CVO qualified under Minn. Stat. § 609.21, subd. 2a(2)(i), to enhance the DWI charge. Given these determinations, the jury instructions fairly defined the prior-conviction element of the DWI charge. "A district court is not required to give a party's proposed instruction if its substance is already included in the instruction proposed by the court." *State v. Schoenrock*, 899 N.W.2d 462, 466 (Minn. 2017).

We are not persuaded that a jury must specifically find that a prior conviction fits within "Minnesota Statutes 2006, section 609.21." Minn. Stat. § 169A.24, subd. 1(3)(ii). Requiring a jury to delve into specific statutory language may result in confusion and misapplication of the law. For example, in *State v. Boecker*, 893 N.W.2d 348, 349, 354 (Minn. 2017), the supreme court concluded that a 1998 CVO conviction qualified for purposes of enhancement, despite section 169A.24 referring to previous felony convictions under "Minnesota Statutes 2006." The district court did not abuse its discretion by declining to instruct the jury to find whether appellant's prior CVO was under a specific statutory subsection.[1]

Appellant also argues that whether his CVO conviction is under an applicable enhancement subsection is a fact question for the jury, and the district court abused its

[1] Even if the district court erred by not requiring the jury to find that appellant's prior CVO was specifically under section 609.21, subdivision 2a(2)(i), any error was harmless beyond a reasonable doubt. *See Schoenrock*, 899 N.W.2d at 467 (concluding that omission of the phrase "with intent to defraud" from jury instruction on the elements of theft by false representation was harmless beyond a reasonable doubt). There was only one conviction at issue, and the sentencing order listed subsection (2)(i) as grounds for that conviction.

discretion by depriving the jury of that fact question. Appellant had a right to a jury determination on whether he has a previous qualifying conviction. *See Berkelman*, 355 N.W.2d at 395. But appellant's challenge is qualitatively different. For two reasons, we conclude that the issue here was properly decided by the district court.

First, appellant argued that his prior conviction does not qualify for purposes of enhancement, thereby raising a legal issue for the district court to determine. Whether a prior conviction statutorily qualifies as a prior impaired-driving conviction for purposes of enhancement is a "legal question." *State v. Smith*, 899 N.W.2d 120, 121 (Minn. 2017); *see also State v. Schmidt*, 712 N.W.2d 530, 539 (Minn. 2006) (concluding that South Dakota convictions could be used for enhancement purposes). Legal issues must be decided by the district court, and it is inappropriate to submit such issues to the jury. *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. App. 2002), *review denied* (Minn. July 16, 2002).

Second, appellant effectively challenged the validity of his prior conviction by asserting that he could not have been convicted under three statutory subsections, thereby raising a legal issue best decided by the district court in a pretrial proceeding. *See State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999) ("An appellate court reviews de novo the constitutional issue of double jeopardy."). Appellant's 2003 sentencing order indicates a qualifying conviction for purposes of enhancement. The record does not indicate that appellant moved to correct that sentencing order. *See* Minn. R. Crim. P. 27.03, subd. 9 ("The court may at any time correct a sentence not authorized by law."); *Schmidt*, 712 N.W.2d at 538 n.4 (noting that collateral attacks on convictions are permitted only in unique cases). The supreme court has indicated that a pretrial proceeding is the proper

venue to challenge the validity of a prior DWI conviction that will be used for enhancement. *State v. Nordstrom*, 331 N.W.2d 901, 905 (Minn. 1983). The issue presented by appellant is a legal issue properly decided in a pretrial proceeding. The district court did not abuse its discretion.

II. The district court did not abuse its discretion by limiting appellant's argument on whether the CVO conviction is under a qualifying subsection.

Appellant next argues that the district court erred by prohibiting him from arguing that he was not convicted of a prior qualifying offense. The district court ordered appellant to refrain from arguing that his 2003 conviction was not under an applicable subdivision for purposes of DWI enhancement.

We review a district court's rulings on evidentiary issues for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Likewise, we review a district court's restriction of the scope of a closing argument for an abuse of discretion. *State v. Caldwell*, 815 N.W.2d 512, 516 (Minn. App. 2012), *review denied* (Minn. July 27, 2012).

Whether appellant was convicted under a qualifying subsection, and whether that conviction was valid, were legal questions decided by the district court in pretrial rulings. Argument contrary to those pretrial rulings would be improper and confusing to the jury. A district court may limit a defendant's arguments to ensure that the jury is not misled. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). The district court did not abuse its discretion by requesting that appellant refrain from arguing legal issues to the jury that had already been determined by the court. *See Mellett*, 642 N.W.2d at 785.

Affirmed.